

SCHWARTZ & PONTERIO, PLLC

ATTORNEYS AT LAW

134 West 29<sup>th</sup> Street – Suite 1001  
New York, New York 10001-5304

Tel. No.: (212) 714-1200

Fax No.: (212) 714-1264

E-Mail: mschwartz@splaw.us

October 24, 2023

**BY ECF**

Hon. Barbara C. Moses  
United States Courthouse  
500 Pearl Street – Room 740  
New York, New York 10007

Re: Bonde v. Wexler & Kaufman, PLLC (Case No. 23-cv-02877-JGK)

Dear Judge Moses:

We represent plaintiff Carl Bonde in the above matter. We submit this joint letter with counsel for defendants as directed by Your Honor's Order dated October 16, 2023 (ECF # 33). We annex as Exhibit A a copy of defendants' full privilege log showing 154 items challenged by plaintiff as highlighted in yellow. The parties' respective arguments relating to the privilege issue have been set forth in the prior submissions (ECF #s 28-30). The parties respond jointly to the Court's remaining questions as follows:

**1. *Have defendants actually retained a forensic expert?***

Defendants have retained Pondurance LLC to provide digital forensic consulting services in this matter.

**2. *Do defendants contemplate conducting a forensic examination of any party's computer(s), network(s), or email account(s) before conducting plaintiff's deposition? If so:***

Yes, Defendants contemplate conducting a forensic examination of all parties' computers, networks and email accounts before conducting plaintiff's deposition.

**a. *How long will the forensic examination(s) take?***

Pondurance LLC has estimated that it will take approximately 90 days to complete the forensic examination of all parties.

**b. *What cooperation will defendants require from plaintiff?***

Defendants will require that Plaintiff cooperate in providing Pondurance LLC with access to the computer, email accounts and networks used by him from June 1, 2022 to August 22, 2022.

**c. *Have the parties met and conferred in good faith regarding the required cooperation?***

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**Defendants' View:** In multiple conversations with Plaintiff throughout the pendency of this matter, it was discussed that Defendants intended to retain a forensic expert to conduct an investigation into which of the parties were the subject of the hacking. Plaintiff has not objected to this position.

**Plaintiff's View:** The parties have not met and conferred. Plaintiff learned that defendants had actually hired a forensic on October 24 during exchange of drafts of this letter. Defendants have not provided any information about the access required for their investigation.

**d. *What steps did defendants take to arrange the forensic examination(s) during the first four months of the five-month-long fact discovery period?***

**Defendants' View:** In multiple conversations with Plaintiff throughout the pendency of this matter, it was discussed that Defendants intended to retain a forensic expert to conduct an investigation into which of the parties were the subject of the hacking. After conducting an investigation into retaining a vendor, Defendants searched for some time to find an appropriate vendor and then located and initiated contact with Pondurance LLC in August 2023. The details regarding the investigation to be conducted by Pondurance LLC in this matter were finalized when the vendor was retained in October 2023.

**Plaintiff's View:** Defendants did not request access to - or any information relating to - any of plaintiff's computer(s), network(s), or e-mail account(s) during the first four months of fact discovery.

**3. *Why, in defendants' view, is the question of which party was hacked the "key issue in this matter?" (See Dkt. 29 at 1.) Why, in plaintiff's view, is it not?***

**Defendants' View:** There is substantial authority for the proposition that the party that was hacked is the party that bears responsibility in these situations. The negligence either in protecting against hacking, or negligence in clicking on a link that lets the hacker "in" to the computer is actionable by others even if not in privity with the negligence party. "In sum, the U.C.C. requires "ordinary care" by participants in financial transactions; the participant who fails to exercise ordinary care is liable for any losses to which his lack of ordinary care substantially contributes." (*Bile v. RREMC*, 2016 US Dist. LEXIS 113874 (E.D. Va. 2016)). See also *Beau Townsend Ford Lincoln, Inc. v. Don Hinds Ford, Inc.* 759 Fed. Appx. 348 (6<sup>th</sup> Cir. 2018) ("Bile illustrate the principle that losses attributable to fraud should be borne by the party in the best position to prevent the fraud"). ("Parties who know or should have known that their email account is at risk of being hacked is in the best position to prevent the fraud.") *Istrich Int'l Co., LTD v. Michael A. Edwards Grp. Int'l Inc.*, 2023 U.S. Dist. LEXIS 105828 (C.D. Cal. 2023).

Here, plaintiff was in the best position to prevent the fraud by protecting his email account. Defendants strongly believe their system was not hacked, and that the hacker was allowed to perpetrate this fraud due to the negligence of the plaintiff. Thus, the question of which party was hacked is the key issue in this matter.

**Plaintiff's View:** Defendants have cited no evidence to support their "strong" belief that plaintiff was hacked. In addition to plaintiff and defendant, there were numerous other parties who had knowledge of the closing date and the parties' contact information that could have been the source of the hack, including the real estate broker, the buyer and his lawyer, and the lender.

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In any event, the question of which party was hacked is immaterial to the liability questions in the case because defendants received conflicting wire instructions and never verbally confirmed either, and never checked the different e-mail addresses associated with each set of instructions.

Defendants have conceded, in their responses to plaintiff's Requests for Admissions, that they received two sets of conflicting wire instructions on the day of the closing. First, in response to an e-mail from defendant Teich, at approximately On August 22, 2022, at approximately 2:03 pm, defendants concede that defendants Teich and Wexler both received an email from plaintiff with correct wire instructions for his HSBC account. RFA #s 32-33. They concede that they did not call to verbally confirm these valid wire instructions. RFA # 34.

Defendants further concede that, in response to an e-mail chain initiated by an e-mail from a fraudster impersonating plaintiff that went to Wexler's spam folder,<sup>1</sup> at approximately 2:44 pm, Wexler requested that the fraudster provide wire instructions (RFA #s 49-50), despite having already received instructions from plaintiff only 40 minutes earlier. Defendants concede that they received the second set of conflicting wire instructions from the fraudster at 3:53 pm (RFA #s 52-53) and then, without verbally confirming them (RFA # 54), sent wire directions to their bank four minutes later at 3:57 pm (RFA # 56) which resulted in the loss of over \$427,000.

The standard of care is to always confirm wire instructions, and no reasonable real estate practitioner would argue otherwise. As defendant's "general counsel" Marc Kaufman said in an e-mail after the loss of the plaintiff's funds, "**ALWAYS confirm wire instructions** with those intended at a number you know to be true and accurate. **There is no real excuse to screw this up.**" RFA #s 74-75 (emphasis added). Ryan Serhant, the pre-eminent real estate broker who referred plaintiff to defendants, along with hundreds of other real estate clients, remarked in an email the following day, "**Very confused by what's going on here...ALL wire instructions and details should always be given over the phone, and recited...**" RS-0034 (emphasis added). The need to confirm wire instructions is even further heightened when, as is the case here, there are *conflicting* wire instructions.

Wire transfer fraud arising from business e-mail compromise scams such as this have become prevalent over the last 10-15 years. The FBI has issued warnings about these scams since at least 2015.<sup>2</sup> The danger has been widely reported and it is now standard practice to confirm e-mail addresses related to wire transfers and to always confirm wire instructions: "This is a five-alarm warning to any financial institution... There should be a 'no-exceptions' practice with every wire transfer request to examine closely and double-check return email addresses. It can be just one letter off and you'll know you're being 'spoofed'... Above all, insist on verbally verifying requests before you wire the money." Briane Grey, corporate security manager for City National Bank, *The Five Red Flags of Wire Fraud* – Crain's New York Business (9/21/18).<sup>3</sup>

The case law on this issue supports plaintiff's position. In *Jetcrete N. Am. v. Austin Truck & Equip.*, 484 F.Supp. 3d 915, 920–91 (D. Nev. 2020), the court found after bench trial that buyer had been in best position to prevent fraudulent misdirection of payment because it had the

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<sup>1</sup> The fraudsters in this case, as is common practice, used email addresses that were similar to plaintiff's and his wife's but were slightly altered: (a) [carl.bonde@rn-e.net](mailto:carl.bonde@rn-e.net) (fraudster account) instead of [carl.bonde@me.com](mailto:carl.bonde@me.com) (plaintiff's actual email address); or (b) [zena.c.benzten@gmail.com](mailto:zena.c.benzten@gmail.com) (fraudster account) instead of [zena.c.bentzen@gmail.com](mailto:zena.c.bentzen@gmail.com) (plaintiff's wife's email address).

<sup>2</sup> [https://www.ic3.gov/Media/PDF/Y2015/PSA150827\\_1.pdf](https://www.ic3.gov/Media/PDF/Y2015/PSA150827_1.pdf)

<sup>3</sup> <https://www.crainsnewyork.com/sponsored-city-national-bank/five-red-flags-wire-fraud>

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opportunity to verify new wire instructions with seller by telephone but did not do so. Similarly, in *Arrow Truck Sales, Inc. v Top Quality Truck & Equip., Inc.*, 2015 WL 4936272 (M.D. Fla. 2015), the court found after bench trial that the would-be buyer had been in best position to prevent fraudulent misdirection of payment to unauthorized third-party because conflicting wire instructions should have prompted buyer to verify the instructions, but buyer did not make any effort to do so. There is no evidence as to how the initial hack occurred and alerted the fraudster to the details of plaintiff's transaction. The manner in which the fraudster gained access to the transaction in this case is immaterial to defendants' liability because of their fundamental and conceded failures to verbally verify wire instructions.

**4. *Is there any reason why the depositions of defendants should not proceed promptly, in advance of the deposition of the plaintiff?***

**Defendants' View:** Defendants object to defendants' depositions taking place in advance of the deposition of the plaintiff. Defendants ask that the forensic investigation be concluded prior to the plaintiff's deposition as this will affect all of the depositions. Also, lead counsel has two upcoming trials, one December 7 and another beginning December 11, 2023, and respectfully requests the depositions occur at the conclusion of the investigation by Pondurance in January of 2024.

**Plaintiff's View:** Plaintiff is prepared to proceed and sees no reason why defendants' depositions should not proceed promptly and in advance of plaintiff's deposition.

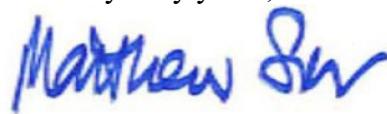
**5. *In light of the foregoing, should the settlement conference in this matter, scheduled for November 2, 2023, proceed as scheduled, or be adjourned to a later date?***

**Defendants' View:** Defendants respectfully request that the settlement conference in this matter be adjourned until the forensic investigation into which party was hacked is concluded.

**Plaintiff's View:** Plaintiff is prepared to proceed with the settlement conference on November 2, 2023. In their responses to the Requests for Admissions, defendants have already conceded many of the facts central to proving their liability. For the reasons discussed above, plaintiff believes the source of the hack is irrelevant to defendants' liability and the outcome of their forensic investigation will not have a significant effect on plaintiff's settlement position.

We look forward to meeting with the Court on October 30, 2023 to discuss these issues.

Very truly yours,



Matthew F. Schwartz

cc: Joseph L. Francoeur, Esq. (By ECF)  
Evgenia Soldatos, Esq. (By ECF)

# EXHIBIT A

## Defendants' Privilege Log

<i>Bates Start</i>	<i>Bates End</i>	<i>Date</i>	<i>Time</i>	<i>Document Type</i>	<i>Sender</i>	<i>Recipient(s)</i>	<i>Subject</i>	<i>Privilege</i>
PRIV 00001	PRIV 00004	8/30/2022	1:49 PM	Email	Brett Wexler	Aleksandr Dzyuba	Bonde Claim	Communication with IT Personnel
PRIV 00005	PRIV 00008	8/30/2022	1:49 PM	Email	Brett Wexler	Aleksandr Dzyuba	Bonde Claim	Communication with IT Personnel
PRIV 00009	PRIV 00011	9/7/2022	10:08 AM	Email	Aleksandr Dzyuba	Brett Wexler CC: Dora Sagdullaev, Marc Kaufman	Bonde Claim	Internal Firm Communication re. Claim
PRIV 00012	PRIV 00014	9/7/2022	10:09 AM	Email	Marc Kaufman	Aleksandr Dzyuba; Brett Wexler CC: Dora Sagdullaev	Bonde Claim	Internal Firm Communication re. Claim
PRIV 00015	PRIV 00018	9/7/2022	10:11 AM	Email	Aleksandr Dzyuba	Marc Kaufman; Brett Wexler CC: Dora Sagdullaev	Bonde Claim	Communication with IT Personnel
PRIV 00019	PRIV 00022	9/7/2022	10:12 AM	Email	Marc Kaufman	Aleksandr Dzyuba; Brett Wexler CC: Dora Sagdullaev	Bonde Claim	Communication with IT Personnel
PRIV 00023	PRIV 00027	9/7/2022	10:13 AM	Email	Aleksandr Dzyuba	Marc Kaufman; Brett Wexler CC: Dora Sagdullaev	Bonde Claim	Communication with IT Personnel
PRIV 00028	PRIV 00033	9/7/2022	10:14 AM	Email	Marc Kaufman	Aleksandr Dzyuba; Brett Wexler CC: Dora Sagdullaev	Bonde Claim	Communication with IT Personnel
PRIV 00034	PRIV 00041	9/7/2022	11:18 AM	Email	Marc Kaufman	Adam Glassman	Bonde Claim	Communication with Outside Counsel
PRIV 00042	PRIV 00050	9/7/2022	4:20 PM	Email	Brett Wexler	Aleksandr Dzyuba CC: Dora Sagdullaev, Marc Kaufman	Bonde Claim	Communication with IT Personnel

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<b>Bates Start</b>	<b>Bates End</b>	<b>Date</b>	<b>Time</b>	<b>Document Type</b>	<b>Sender</b>	<b>Recipient(s)</b>	<b>Subject</b>	<b>Privilege</b>
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PRIV 00053	PRIV 00053	9/21/2022	9:31 AM	Email Attachment			Bonde Claim	Email attachment to Privileged Communication
PRIV 00054	PRIV 00055	9/21/2022	9:33 AM	Email	Keith Bader	Brett Wexler CC: Marc Kaufman	Bonde Claim	Communication with Carrier re. Claim
PRIV 00056	PRIV 00056	9/21/2022	9:33 AM	Email Attachment				Email attachment to Privileged Communication
PRIV 00057	PRIV 00057	9/21/2022	9:33 AM	Email Attachment				Email attachment to Privileged Communication
PRIV 00058	PRIV 00058	9/21/2022	9:33 AM	Email Attachment				Email attachment to Privileged Communication
PRIV 00059	PRIV 00061	9/21/2022	9:34 AM	Email	Marc Kaufman	Keith Bader;Brett Wexler	Bonde Claim	Communication with Carrier re. Claim
PRIV 00062	PRIV 00064	9/21/2022	9:35 AM	Email	Brett Wexler	Keith Bader CC: Marc Kaufman	Bonde Claim	Communication with Carrier re. Claim
PRIV 00065	PRIV 00067	9/21/2022	9:37 AM	Email	Keith Bader	Brett Wexler CC: Marc Kaufman	Bonde Claim	Communication with Carrier re. Claim
PRIV 00068	PRIV 00069	9/22/2022	11:36 AM	Email	Keith Bader	Brett Wexler;Marc Kaufman	Bonde Claim	Communication with Carrier re. Claim
PRIV 00070	PRIV 00070	9/22/2022	11:36 AM	Email Attachment			Bonde Claim	Email attachment to Privileged Communication
PRIV 00071	PRIV 00071	9/22/2022	11:36 AM	Email Attachment			Bonde Claim	Email attachment to Privileged Communication
PRIV 00072	PRIV 00073	9/22/2022	11:36 AM	Email Attachment			Bonde Claim	Email attachment to Privileged Communication
PRIV 00074	PRIV 00075	9/22/2022	11:36 AM	Email Attachment			Bonde Claim	Email attachment to Privileged Communication
PRIV 00076	PRIV 00077	9/22/2022	11:52 AM	Email	Brett Wexler	Keith Bader;Marc Kaufman	Bonde Claim	Communication with Carrier re. Claim

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<b>Bates Start</b>	<b>Bates End</b>	<b>Date</b>	<b>Time</b>	<b>Document Type</b>	<b>Sender</b>	<b>Recipient(s)</b>	<b>Subject</b>	<b>Privilege</b>
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PRIV 00080	PRIV 00082	9/22/2022	12:00 PM	Email	Keith Bader	Brett Wexler CC: Marc Kaufman	Bonde Claim	Communication with Carrier re. Claim
PRIV 00083	PRIV 00083	9/22/2022	12:00 PM	Email Attachment			Bonde Claim	Email attachment to Privileged Communication
PRIV 00084	PRIV 00084	9/22/2022	12:00 PM	Email Attachment			Bonde Claim	Email attachment to Privileged Communication
PRIV 00085	PRIV 00086	9/22/2022	12:00 PM	Email Attachment			Bonde Claim	Email attachment to Privileged Communication
PRIV 00087	PRIV 00089	9/28/2022	3:53 PM	Email	Brett Wexler	Keith Bader CC: Marc Kaufman	Bonde Claim	Communication with Carrier re. Claim
PRIV 00090	PRIV 00092	9/28/2022	3:54 PM	Email	Marc Kaufman	Brett Wexler CC: Evan Teich	Bonde Claim	Internal Firm Communication re. Claim
PRIV 00093	PRIV 00095	9/28/2022	3:54 PM	Email	Marc Kaufman	Brett Wexler CC: Evan Teich	Bonde Claim	Internal Firm Communication re. Claim
PRIV 00096	PRIV 00099	9/28/2022	3:54 PM	Email	Brett Wexler	Marc Kaufman CC: Evan Teich	Bonde Claim	Internal Firm Communication re. Claim
PRIV 00100	PRIV 00102	9/28/2022	3:55 PM	Email	Keith Bader	Brett Wexler CC: Marc Kaufman	Bonde Claim	Communication with Carrier re. Claim
PRIV 00103	PRIV 00105	9/28/2022	3:55 PM	Email	Keith Bader	Brett Wexler CC: Marc Kaufman	Bonde Claim	Communication with Carrier re. Claim
PRIV 00106	PRIV 00108	9/28/2022	3:57 PM	Email	Brett Wexler	Anne Jaskula CC: Marc Kaufman, Keith Bader	Bonde Claim	Communication with Carrier re. Claim
PRIV 00109	PRIV 00112	9/28/2022	4:01 PM	Email	Marc Kaufman	Brett Wexler CC: Evan Teich	Bonde Claim	Internal Firm Communication re. Claim
PRIV 00113	PRIV 00116	9/28/2022	4:01 PM	Email	Brett Wexler	Anne Jaskula CC: Marc Kaufman, Keith Bader	Bonde Claim	Communication with Carrier re. Claim

## Defendants' Privilege Log

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PRIV 00119	PRIV 00123	9/28/2022	4:02 PM	Email	Brett Wexler	Marc Kaufman CC: Evan Teich	Bonde Claim	Internal Firm Communication re. Claim
PRIV 00124	PRIV 00127	9/28/2022	4:04 PM	Email	Anne Jaskula	Brett Wexler CC: Marc Kaufman;Keith Bader;Joseph Kenneth Garcia	Bonde Claim	Communication with Carrier re. Claim
PRIV 00128	PRIV 00132	9/28/2022	4:06 PM	Email	Brett Wexler	Anne Jaskula CC: Marc Kaufman;Keith Bader;Joseph Kenneth Garcia	Bonde Claim	Communication with Carrier re. Claim
PRIV 00133	PRIV 00137	9/29/2022	6:41 AM	Email	Brett Wexler	Anne Jaskula CC: Marc Kaufman;Keith Bader;Joseph Kenneth Garcia	Bonde Claim	Communication with Carrier re. Claim
PRIV 00138	PRIV 00142	9/29/2022	6:41 AM	Email	Brett Wexler	Anne Jaskula CC: Marc Kaufman;Keith Bader;Joseph Kenneth Garcia	Bonde Claim	Communication with Carrier re. Claim
PRIV 00143	PRIV 00147	9/29/2022	6:41 AM	Email	Brett Wexler	Anne Jaskula CC: Marc Kaufman;Keith Bader;Joseph Kenneth Garcia	Bonde Claim	Communication with Carrier re. Claim

## Defendants' Privilege Log

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PRIV 00154	PRIV 00160	9/29/2022	10:22 AM	Email	Brett Wexler	Joseph Kenneth Garcia CC: Marc Kaufman;Aleksandr Dzyuba;Dora Sagdullaev	Bonde Claim	Communication with Carrier and IT Personnel re. Claim
PRIV 00161	PRIV 00167	9/30/2022	10:00 AM	Email	Aleksandr Dzyuba	Brett Wexler;Anne Jaskula CC: Marc Kaufman, Keith Bader, Joseph Kenneth Garcia	Bonde Claim	Communication with Carrier and IT Personnel re. Claim
PRIV 00168	PRIV 00175	8/24/2022	7:57 AM	Whatsapp	Brett Wexler	Marc Kaufman	Bonde Claim	Internal Firm Communication re. Claim
PRIV 00168	PRIV 00175	8/24/2022	7:57 AM	Whatsapp	Brett Wexler	Marc Kaufman	Bonde Claim	Internal Firm Communication re. Claim
PRIV 00168	PRIV 00175	8/24/2022	9:02 AM	Whatsapp	Marc Kaufman	Brett Wexler	Bonde Claim	Internal Firm Communication re. Claim
PRIV 00168	PRIV 00175	8/24/2022	9:04 AM	Whatsapp	Brett Wexler	Marc Kaufman	Bonde Claim	Internal Firm Communication re. Claim
PRIV 00168	PRIV 00175	8/24/2022	9:10 AM	Whatsapp	Marc Kaufman	Brett Wexler	Bonde Claim	Internal Firm Communication re. Claim
PRIV 00168	PRIV 00175	8/24/2022	9:10 AM	Whatsapp	Brett Wexler	Marc Kaufman	Bonde Claim	Internal Firm Communication re. Claim
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PRIV 00168	PRIV 00175	8/24/2022	9:11 AM	Whatsapp	Brett Wexler	Marc Kaufman	Bonde Claim	Internal Firm Communication re. Claim
PRIV 00168	PRIV 00175	8/24/2022	9:11 AM	Whatsapp	Brett Wexler	Marc Kaufman	Bonde Claim	Internal Firm Communication re. Claim

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<i>Bates Start</i>	<i>Bates End</i>	<i>Date</i>	<i>Time</i>	<i>Document Type</i>	<i>Sender</i>	<i>Recipient(s)</i>	<i>Subject</i>	<i>Privilege</i>
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PRIV 00204	PRIV 00207	9/21/2022	10:08 AM	Whatsapp	Brett Wexler	Marc Kaufman	Bonde Claim	Internal Firm Communication re. Claim
PRIV 00204	PRIV 00207	9/21/2022	10:09 AM	Whatsapp	Marc Kaufman	Brett Wexler	Bonde Claim	Internal Firm Communication re. Claim
Wexler 0005282	Wexler0005 283	9/7/2022	10:06AM	Email	Brett Wexler	Aleksandr Dzyuba; CC: Dora Sagdullaev and Marc Kaufman	FW: 22 Renwich, 7B	Communication with Carrier and IT Personnel re. Claim